April Term, 1760.

WILLIAM ALLEN, Chief Juſtice.
LAWRENCE GROWDEN, } Juſtices.
WILLIAM COLEMAN, }

STEVENSON *verſus* PEMBERTON.

SCIRE *facias* againſt Defendant as Garniſhee. The Caſe was; C. in the *Weſt-Indies* was indebted to P. the Defendant, for Bills of Exchange drawn by C. in Favour of P. which were proteſted. P. by Letter ſolicits C. for Security. C. conſigns a Quantity of Rum to P. and by Letter directs P. to ſell the ſame for his (C's) Account, and apply the Proceeds to the Payment of ſome proteſted Bills drawn by C. in favour of other People "*firſt being ſatisfied that his (P's) Bills were paid.*"—The Bills of Lading expreſs this Rum to be ſhipt on the proper Account and Riſque of C.—The Rum comes into P's Hands, *but before any Sale*, the Plaintiff S. a Creditor of C. brought a foreign Attachment againſt C. and attached theſe Goods in the Hands of P.—The Queſtion on theſe Facts, as found by a ſpecial Verdict, was, Whether P. ſhould retain the Goods for the Payment of his own Debt, or whether the Property remained in C. ſo as to be liable to the Attachment of S?

It was urged by the Council for the Plaintiff, that the Conſignment of this Rum to P. on the Account of C. with Orders to ſell the ſame *on the Account of C.* and then to apply the Proceeds according to his Directions, did not alter the Property, but left the ſame in C. till a Sale. And that P. was only to have a future Intereſt in the *Money* ariſing from the Sale of the Goods.—But the Plaintiff being as well a Creditor as the Defendant, and coming in under the Law of Attachments *before a Sale* and while the Property, by the very Terms of the Conſignment, remained in C. ought to be firſt paid his Debt. The counſel cited *Bro. Property* 2. 2 *Mod.* 242. 2 *Chan. Caſes.* 7. 36. 1. *Salk.* 160. 12 *Mod.* 156.

For the Defendant: It was contended, that the Rum was a Security in the Hands of P. for the Payment of P's Debt, and that P. was a Truſtee for himſelf and the other *Dutch* Bill Creditors. And that ſuch a ſpecial Property was veſted in P. that C. himſelf could have no Remedy to get theſe Goods out of the Hands of P. till P's Debt was ſatisfied; and that the Plaintiff could be in no better caſe than C. himſelf.—The Caſes cited for the Defendant were 2 *Vern.* 428. 2 *Thomas Jones* 222. 2 *Peere Williams* 226. *Bro. Act. ſur Caſe* 113. 271. *Finch* 299. 236. 10 *Mod.* 432. *Yelv.* 164. 2 *Lutw.* 30. 10 *Mod.* 144. 2 *Co.* 26. 1 *Stra.* 165. *

* See *Cowp.* 125. *et ant.*

1760. BY THE COURT. This Rum appears to have been ſent to ſatisfy P's Debt. If it had been Money, there could have been no doubt but the Defendant would have retained it. And the only difference is that a Commodity was ſent which muſt be converted into Money, before the Sum to be paid to P. could be aſcertained, but, as to P's intereſt in it, the Caſe was the ſame. Therefore judgment, by the whole Court, was given for the Defendant.

Chew and *Molana pro* Quer.—*Galloway* and *Dickenſon pro* Def.

The Leſſee of ASHTON *verſus* ASHTON.

Preſent LAWRENCE GROWDON } Juſtices.
WILLIAM COLEMAN. }

ON ſpecial Verdict. Deviſe to the *firſt Heir Male* of I. S. *when* he ſhall arrive to the Age of 21 Years, he *paying* to A. and B. the Daughters of I. S. £. 40 each.—*After Deviſor's Death* I. S. had a Son, who attained the Age of 21 Years, and paid his Siſters the £. 40 each.

The Queſtion was, whether the Son of I. S. could take by executory Deviſe?—It was objected for the Defendant, 1ſt. That this being a preſent Deviſe it could not take Effect becauſe to a Perſon not *in eſſe*. 2d. That though it might be conſtrued a future Deviſe, yet it was too remote; for an executory Deviſe muſt take effect within the Compaſs of a Life or Lives *in eſſe*, or at fartheſt within nine Months after: And in this caſe I. S. might have had no Son but a Daughter, who might have had a Daughter, who might have had a Son, who would have been the *firſt Heir Male* of I. S. which would have been too remote a Contingency, and would have tended to a Perpetuity. And the Caſe muſt be conſidered as at the Time of making the Deviſe, that is, how it might be; and not how it has actually happened. 3d. That the Son of I. S. could not take, becauſe the Limitation was to the *firſt Heir Male* and *Nemo eſt Hæres Viventis*.

For the Plaintiff it was anſwered: 1ſt. That this was no preſent Deviſe, the Teſtator taking Notice that I. S. had no Son born by the Word *firſt* Heir Male, and uſing the Words *when* and *paying*.—2d. That this Contingency was not too remote, becauſe the Teſtator by the Words *firſt Heir Male*, muſt have meant *firſt Son*; and that ſuch a Conſtruction muſt be made as to carry the Intent of the Teſtator into Execution.—3d. *Firſt Heir Male* are Words of Purchaſe and *Deſignatio Perſonæ*, and the Law will ſupply the Words *of the Body* in a Will.

BY THE COURT. The Intent of the Teſtator is clear, that the firſt *Son* of I. S. ſhould take. Therefore judgment BY THE COURT.

Caſes cited; 1 Lord *Raym.* 207 1 *Salk* 229. *Talbot's Caſes* 44. 50. 145. 1 *Vern* 729. *Vin Dev.* 315. 2 *Vent* 311. 1 *Peer. Williams* 229. 3 Co. 20, 2 *Peer. Williams* 196. 2 *Salk* 621.

Chew pro Quer. *Moland* and *Dickenſon pro* Def. * *April*

* See 12 *Mod* 279. 287. 1 *Inſt.* 24.